Petition

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81-291

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROBERT BOCHNIAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Was the consent of respondent's mother to a search of her garage legally sufficient to render the items seized admissible at respondent's trial where the mother authorized the search by the use of her key, and where the police officer had no reason to even suspect that the mother might not be absolutely entitled to the full use and possession of her property.

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In The

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROBERT BOCHNIAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

Petitioner, People of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on February 17, 1981.

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 93 Ill. App. 3d 575, 417 N.E. 2d 722 (1st Dist. 1981), and appears herein as Appendix A. The ruling of the trial court on respondent's motion to suppress evidence is not reported, and appears herein as Appendix B. The order of the Illinois Supreme Court of June 8, 1981, denying petitioner's petition for leave to appeal is reported at 85 Ill. 2d (16), and appears herein as Appendix C.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on February 17, 1981. A timely petition for leave to appeal was denied by the Illinois Supreme Court on June 8, 1981. That order appears herein as Appendix C. This petition was filed within 60 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Search

On the morning of December 7, 1978, the manager of Roland & Sons, Inc. told Chicago Police Officer Nick Stasinopoulos that respondent Robert Bochniak, an employee of the company, and respondent's brother had stolen electrical supplies from the company (R. 11-12, 15-16) The officer then went to 2554 West Augusta Boulevard and knocked on the front door of the house. (R. 11) A woman who identified herself as Cathleen Olijnek, respondent's mother, answered the door. (R. 12)

Officer Stasinopoulos identified himself and told her that he was investigating a theft by respondent and that the stolen goods were alleged to be in the garage. Mrs. Olijnek said that it was probably not true but that the officer was "welcome to come in and look." (R. 12) She told the officer that she was the owner of the house and the garage. (R. 21)

Mrs. Olijnek told the officer that she would have to put her dogs away first and she asked the officer to wait for a few minutes. (R. 12) About 15 minutes later she returned and let Officer Stasinopoulos into her backyard at the side entrance. (R. 13) At the time, a stepbrother of respondent, Michael Olijnek, was placing a ladder against the side of the building. (R. 14) Mrs. Olijnek used her key to open the garage door and she and her son Michael then entered the garage. The officer followed. (R. 15, 28) In the garage Officer Stasinopoulos found a large quantity of electrical supplies. (R. 15)

Motion to Suppress

Prior to trial, the respondent filed a motion to suppress in which he alleged that the search of the garage violated his rights under the Fourth Amendment to the United States Constitution. (R. C17-18) At a hearing held on the motion, the respondent testified that he and his brother Peter Bochniak rented the garage at 2554 West Augusta Boulevard from their mother for $20.00 per month. (R. 3-4) Respondent said that he lived next door at 2550 West Augusta Boulevard. (R. 7) He testified that he was at work on December 7, and that when he went home for lunch he saw police officers at his mother's home. (R. 8) He said that he went over to ask them what they were doing in the garage and that they told him that they were looking for stolen material and that the landlord had let them in. (R. 8-9) Respondent said that no member of his family was in the garage at the time. (R. 9)

Mrs. Olijnek testified that she lived at 2554 West Augusta Boulevard and that there was a garage behind her home. (R. 23) She said that she rented the garage to her two sons, Peter and respondent. (R. 23) Mrs. Olijnek said that she did not have a written or an oral lease to rent the garage, that "They just pay me." (R. 26)

She stated that on December 7, policemen came to her home, asked for her son, and told her that they were looking for some missing "C.B. and stereo" and wanted to see the garage. (R. 24) She told them to wait while she went to lock up her dogs. (R. 24) She said that she got her son Michael, gave him the key she had to the garage, and sent him to let the policemen into it. (R. 28)

Mrs. Olijnek said that she told the police officers that she owned the garage and that she never mentioned to them that her sons rented it from her. (R. 26)

Rulings

At the conclusion of the testimony at the hearing, the trial court, finding that "Just because the mother thinks she has a right to let them go in, and because the police think they have a right to go in, that doesn't mean they have a right to go in," suppressed the evidence. (R. 34-35)

On appeal the Illinois Appellate Court held that although Mrs. Olijnek owned the garage behind her house and retained a key for access, under this Court's decision in *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988 (1974), she did not have common authority over the premises and her consent was, therefore, invalid. The Court then went on to hold that although Mrs. Olijnek owned the premises, invited the police to search the garage, provided the key that opened the garage, and never suggested that anyone rented the garage from her, on the basis of the decision in *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889 (1964), the search was unreasonable because the police officer could not rely on Mrs. Olijnek's apparent authority to consent to the search.

The petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court.

REASON FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT ERRONEOUSLY CONCLUDED THAT THE EXCLUSIONARY RULE REQUIRED THE SUPPRESSION OF EVIDENCE RECOVERED IN A SEARCH OF RESPONDENT'S MOTHER'S GARAGE WHERE THE MOTHER, RESIDENT OWNER OF THE HOUSE AND GARAGE, AUTHORIZED THE SEARCH BY THE USE OF HER KEY, AND WHERE, AT THE TIME OF THE SEARCH, THERE WAS NO SUGGESTION OR INDICATION THAT SHE WAS NOT ABSOLUTELY ENTITLED TO THE FULL USE AND POSSESSION OF HER PROPERTY.

In the course of investigating allegations that respondent and his brother had stolen merchandise from respondent's employer and were secreting it in a garage at 2554 West Augusta Boulevard, Officer Stasinopoulos went to that address and knocked on the door of the residence. A woman answered and identified herself as respondent's mother, Cathleen Olijnek. After being informed of the accusation against her son, Mrs. Olijnek said that it was probably not true but that the officer was "welcome to come in and look." (R. 12; Pet. 1a) She told the officer that she was the owner of the house and the garage. Then, using her key to gain entry, Mrs. Olijnek opened the garage door and allowed the officer to search the area. During the course of the search certain electrical components were seized.

Prior to trial, the respondent moved to suppress the evidence as seized in violation of his Fourth Amendment rights. At the hearing respondent presented testimony that he lived next door to his mother, and that he and his brother Peter paid his mother $20.00 per month for the use of the garage and no one else used it. When

asked if there was a lease for the garage, Mrs. Olijnek said that her sons "just pay me." (R. 26) The trial court, finding that Mrs. Olijnek's belief that she was entitled t enter and permit entry to her garage and the officer's belief that she had the authority to consent to the entry did not mean that either had the right of entry, suppressed the items seized.

On appeal from that ruling, the Illinois Appellate Court, erroneously concluding that because Mrs. Olijnek did not actually use her garage she did not have common authority over it, found her consent to be invalid based on its reading of the decision in *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988 (1974). The Appellate Court then equated Mrs. Olijnek's status to that of a hotel clerk and concluded that although she possessed all of the outward indicia of a person with the authority to consent to the search of her own garage, the "trend" in Illinois was that this Court's decision in *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964) does not permit the application of apparent authority to a third party consensual search. Petitioner respectfully suggests that the holding of the Illinois Appellate Court from which the Writ of Certiorari herein is sought is not only contrary to the purpose and intent of *Matlock*, *Stoner*, and the Fourth Amendment right to privacy, but it effectively rewrites this Court's exclusionary rule so as to require the suppression of evidence recovered as the result of proper and good faith police conduct.

First, by holding that Mrs. Olijnek did not have actual authority to consent to the search of her garage, the Appellate Court has restricted the concept of common authority to actual use, a limitation that is in conflict with *Matlock* and the principle that the Fourth Amendment protects only legitimate expectations of privacy.

In *Matlock*, this Court recognized that permission to search may be validly obtained from a third party who possesses "common authority or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 172, 94 S.Ct. at 993. The Court attempted to clarify the expression "common authority" by noting that it does not rest on the law of property but rather on the mutual use of property by persons having joint access or control so that it is reasonable to recognize that they have each "assumed the risk that one of their number might permit the common area to be searched." *Id.* at n. 7. Since *Matlock*, the term common authority has been recognized as embodying the right of a third party to use the premises rather than his actual use of them. *United States v. Cook*, 530 F.2d 145 (7th Cir. 1976), *cert. denied*, 426 U.S. 909 (1976); *People v. Stacey*, 58 Ill. 2d 83, 317 N.E.2d 24 (1974); *People v. Ford*, 83 Ill. App. 3d 57, 403 N.E.2d 512 (3rd Dist. 1980). The interpretation of common authority as the right to use the property is the only one that is consonant with recognized Fourth Amendment principles.

As developed by this Court, the Fourth Amendment protects only those areas in which a person has a legitimate expectation of privacy, not those areas in which he holds only a subjective belief that no one will enter. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978). Therefore, since the concept of common authority embodies a recognition that a person has assumed certain risks, it must be defined with a view towards a person's legitimate expectations of privacy, not his subjective beliefs. While a person may believe that he has found the perfect hiding place, he can have no reasonable or protected expectation that he or his possessions will not be discovered if others have the right of access to the area.

In the case under discussion, respondent could have had no legitimate expectation of privacy in his mother's garage. While respondent's mother had apparently not used the garage recently since she had no car and had ample storage space in the basement of her house, respondent could not legitimately believe that she would not enter. She owned the garage and it was located on her property immediately behind her house. She also retained a key for access to the garage. If she had not entered earlier, it was only because she had no need to, not because she did not have the right or authority. The respondent could not later limit her authority to use the garage simply because he had hidden the fruits of his crime there in the subjective belief that because she had not entered earlier she would not enter now. Indeed, a somewhat analogous claim was brusquely rejected by this Court in *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420 (1969).

However, the actual use standard adopted by the Illinois Appellate Court is a total rejection of the reasonable and objective standard for judging Fourth Amendment rights so carefully developed by this Court. Instead, by defining common authority as encompassing only actual use, the Appellate Court has declared that the Fourth Amendment protects subjective and unreasonable expectations. In effect, the Illinois court has elevated a burglar's hope that the residents will not return to their home during the course of the crime to a Constitutionally protected expectation of privacy. This erroneous interpretation of privacy is in derogation of proper Fourth Amendment principles as announced by this Court and should not be allowed to stand.

Moreover, even if it could be thought that Mrs. Olijnek did not have actual authority to consent to the

entry, the circumstances fully justified the police officer's belief that she did have such authority and the Fourth Amendment exclusionary rule is not furthered by and does not require the suppression of the evidence seized.

The Fourth Amendment provides that citizens shall be secure against unreasonable searches and seizures. The exclusionary rule, which was first held applicable to the States through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), is a remedy for a Fourth Amendment violation but not a constitutional right. The prime purpose of the rule is to "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 619-620 (1974). Therefore, as this Court has often noted, the reason for the rule loses its force when the official action was pursued in the utmost of good faith. *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365 (1974). Thus, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge that the search was unconstitutional under the Fourth Amendment." *United States v. Peltier*, 442 U.S. 531, 542, 95 S.Ct. 2313, 2320 (1975).

However, by its decision, the Illinois Appellate Court, following what it felt was a "strong Illinois trend" (Pet. 4a), has rewritten the Fourth Amendment exclusionary rule and declared that regardless of the reasonableness of the search and the good faith actions of the police officer, evidence must be suppressed if it can later be said that the owner of private residential property did not have actual authority to use his own property. Although Mrs.

Olijnek's appearance of authority and the officer's good faith belief that she had such authority is unquestioned (Pet. 3a-4a, 7a), the Appellate Court felt that suppression was required by this Court's decision in *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964). The Appellate Court felt that Justice Stewart's comment in *Stoner* that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority,'" 376 U.S. at 488, 84 S.Ct. at 892, meant that there could be no doctrine of apparent authority in a third party counsensual search situation. This belief is patently erroneous. *See, People v. Carr*, 8 Cal. 3d 287 (1972); *People v. Superior Court of Kern County*, 77 Cal. App. 3d 69 (5th Dist. 1978).

Although *Stoner* did hold that a police officer could not reasonably believe that a hotel clerk had the authority to grant the police the right to search a room rented to Stoner, this Court has never suggested that a police officer may never rely on the apparent authority to consent of one in possession of property. In fact, it could not without rejecting the prime purpose of the exclusionary rule—deterrence. As in *Stoner* and the earlier decision in *Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776 (1961), it was obvious that the police officer could not have reasonably believed that person who consented to the search had the authority to do so.

However, while this Court has never addressed the issue presented, it is a far cry from saying that a police officer cannot reasonably believe that a hotel clerk or an obvious landlord has the authority to grant permission to search someone else's premises to a conclusion that a police officer cannot reasonably believe that a homeowner has the authority to consent to a search of his

garage, especially where he effects entry with his own key.

Moreover, by rejecting the concept of deterrence and in its place imposing punishment for punishment's sake, such a determination would effectively undercut every decision of this Court interpreting the Fourth Amendment exclusionary rule. Indeed, the Appellate Court's holding that there can never be good faith reliance on apparent authority renders the propriety of consensual searches a hit or miss proposition since a police officer must, of necessity, go by appearances, and can never know until the motion to suppress whether or not the consenting party had actual authority to consent to the entry. This result furthers no Constitutional imperative and is a disservice to the exclusionary rule.

In summary, petitioner submits that the Illinois Appellate Court completely misapplied every Fourth Amendment principle espoused by this Court when it erroneously held that respondent's mother had neither actual nor apparent authority to consent to the search of her garage. Without guidance from this Court, the Appellate Court's determination that the doctrine of common authority embodies only actual use rather than the right to use will effectively erode any thought that Fourth Amendment rights are limited to a person's legitimate expectations of privacy. Further, regardless of whether respondent's mother had actual authority, as recognized by both the Illinois Appellate Court and the trial court, she had every indicia of such authority and evidence recovered as the result of a police officer's good faith reliance on that appearance of authority must not be suppressed unless the very purpose of the exclusionary rule is to be abandoned. Therefore, since the Appellate Court believed that the doctrine of apparent authority and good faith reliance was precluded by this

Court's decision in *Stoner*, certiorari should be granted so that the area of apparent authority and good faith law enforcement reliance may be clarified and explained.

CONCLUSION

For the foregoing stated reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, First Division.

Respectfully submitted,

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August 7, 1981

APPENDIX A

Opinion of the Appellate Court of Illinois

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, *v.*
ROBERT BOCHNIAK, Defendant-Appellee.
First District (1st Division) No. 80-574
Order affirmed.
Opinion filed February 17, 1981.

APPEAL from the Circuit Court of Cook County; the Hon. KENNETH WENDT, Judge, presiding.

Bernard Carey, State's Attorney, of Chicago (Marcia B. Orr and Kathleen Warnick, Assistant State's Attorneys, of counsel), for the People.

Victor F. Ciardelli, Ltd., of Chicago, for appellee.

Mr. JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal by the State, pursuant to Supreme Court Rule 604(a)(1), from an order by the trial court sustaining defendant's motion to suppress.

After he received a tip-off that defendant Robert Bochniak and his brother had stolen materials from defendant's place of employment, Officer Stasinopoulos went to 2554 West Augusta in Chicago, believing that to be defendant's home address. Defendant actually resided at 2550 West Augusta. When the officer knocked on the door at 2554 West Augusta, defendant's mother, Mrs. Catherine Olijnek answered.

When the officer informed Mrs. Olijnek that there were stolen goods in the garage, she claimed that it was untrue but invited him to inspect. The officer testified that Mrs. Olijnek and defendant's brother Michael entered the garage and that he followed. Mrs. Olijnek testified that she did not accompany the officer to the

garage. It is undisputed, however, that the door was opened with her key. Inside the garage, the officer found electrical supplies.

Defendant arrived at his mother's home and asked the police what they were doing in his garage. The officer informed him that he was looking for stolen electrical supplies and that he did not need a search warrant because the landlord had granted him entry.

Mrs. Olijnek was the owner of the garage, but had been renting it out to her two sons for $20 per month for approximately 6 years. She testified that she never used the garage.

The trial court sustained defendant's motion to suppress the evidence. The State appeals from that order.

We affirm.

On appeal, the State argues that the trial court erred in sustaining defendant's motion to suppress because (1) defendant's mother had the actual authority to consent to a search of the garage, or (2) defendant's mother had the apparent authority to consent to a search of the garage.

We must first determine whether defendant's mother had the actual authority to consent to the search of the garage. The consent of one who possesses common authority over the premises or effects is valid as against the absent nonconsenting person with whom that authority is shared. (*United States v. Matlock* (1974), 415 U.S. 164, 170, 39 L. Ed. 2d 242, 94 S. Ct. 988; *People v. Stacey* (1974), 58 Ill. 2d 83, 87, 317 N.E. 2d 24.) Whether one possesses such authority depends on the particular facts and circumstances of each case.

The State argues that since defendant's mother owned the premises on which the garage was located, retained a key to the garage and had never explicitly been ordered to stay out of the garage, she had the actual authority to consent to the search. Defendant, on the other hand, maintains that since he and his brother rented the garage from their mother for $20 per month

and since his mother never used the garage because she had no reason to do so, she did not have authority to consent to the search.

The fact that defendant's mother owned the garage does not mean that she had the actual authority to consent to a search of the garage. In *United States v. Matlock*, Justice White of the United States Supreme Court stated that "[c]ommon authority is * * * not to be implied from the mere property interest a third party has in the property." (415 U.S. 164, 171 n.7, 39 L. Ed. 2d 242, 250 n.7, 94 S. Ct. 988, 993 n.7; *People v. Ford* (1980), 83 Ill. App. 3d 57, 62-63, 403 N.E.2d 512; *People v. Schlemm* (1980), 82 Ill. App. 3d 639, 644, 402 N.E.2d 810.) Nor does the fact that defendant's mother was in possession of a key to the garage necessarily vest her with such authority. See *People v. Weinstein* (1968), 105 Ill. App. 2d 1, 245 N.E.2d 788.

Rather, the authority which justifies third-party consent rests on the mutual use of the property by persons generally having joint access or control for most purposes. (*United States v. Matlock* (1974), 415 U.S. 164, 171 n.7, 39 L. Ed. 2d 242, 250 n.7, 94 S. Ct. 988, 993 n.7) *People v. Stacey* (1974), 58 Ill. 2d 83, 317 N.E.2d 24.) Mrs. Olijnek testified that she never went inside the garage and that she had no reason to do so. Thus, the garage was used exclusively by defendant and his brother Michael. We conclude that although defendant's mother owned and retained a key to the garage, she did not have common authority over the premises. Her consent to the search of the garage was therefore invalid.

The State alternatively argues that the search of the garage was valid because defendant's mother had the apparent authority to consent to the search. In support of this argument, the State points to several facts in the record, namely: that defendant's mother answered the door at the address where the police thought defendant resided; that she identified herself as defendant's mother; that she said she owned the premises; that she invited the police to search; that she opened the garage

with a key; and that she failed to tell the police that defendant rented the garage from her.

In 1964 in *Stoner v. California* (1964), 376 U.S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889, the United States Supreme Court considered an argument similar to the one at hand, and held that "[o]ur decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" (376 U.S. 483, 488, 11 L. Ed. 2d 856, 860, 84 S. Ct. 889, 892.) Four years later, in *People v. Miller* (1968), 40 Ill. 2d 154, 238 N.E.2d 407, the Illinois Supreme Court was presented with a factual situation under which it easily could have upheld a search conducted pursuant to the consent of one who had apparent authority over the subject property. The supreme court, however, relying on *Stoner* rejected the prosecution's apparent authority argument. Subsequent Illinois cases also have refused to apply the apparent authority doctrine in consent search cases. (See *People v. Schlemm* (1980), 82 Ill. App. 3d 639, 402 N.E.2d 810; *People v. Johnson* (1975), 28 Ill. App. 3d 799, 329 N.E.2d 464.) In accordance with the strong Illinois trend, we reject the State's apparent-authority argument.

For the foregoing reasons, we affirm the order of the circuit court of Cook County.

Order affirmed.

GOLDBERG P.J., and O'CONNOR, J., concur.

APPENDIX B

Findings of Trial Court on Motion to Suppress.

STATE OF ILLINOIS
COUNTY OF COOK—ss.

IN THE
CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

ROBERT BOCHNIAK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Information No. 79-00676
Charge: Theft

REPORT OF PROCEEDINGS on a Motion to Suppress the Evidence had in the above-entitled cause on Monday, the 21st day of May, A.D. 1979, before the Honorable KENNETH WENDT, Judge of said court.

APPEARANCES:

HON. BERNARD CAREY,
State's Attorney of Cook County, by
MR. MICHAEL SIMKIN,
Assistant State's Attorney,
appeared for the People-Respondent;

MR. VICTOR F. CIARDELLI,
appeared for the Defendant-Petitioner.

* * *

THE COURT: Do you think it's the law just because they believe they have a right to go in and just because there is a right to go in?

MR. SIMKIN: I think there's a case like that, Judge. There is a case.

THE COURT: If there is a case, then talk to your appellate people.

Whether the boy lived in his mother's house—he used her garage, and she thought she had a right to open it up, and the police came and they saw. They thought they had a right to open it up, but when the boy testifies like he did—I told my mother to keep out of my room. Let her go in every once in a while and sweep up, what have you—every once in a while in the house, not in the garage. In a separate room where people are paying rent.

MR. SIMKIN: Judge, can I say that the mother testified that the sons never told her to stay out of the garage.

THE COURT: I'm talking about a case where they said she had not. They rent there. They pay $20 a month, $10 each. It's a separate building. It's a garage.

You can check with your people downstairs and see if there isn't a case like I just told you in a home where the mother thought she could let them in and she let the police in and the police thought they had a right to go in.

MR. SIMKIN: Judge, I'm familiar with the case but the difference in that case, Judge,—I'm not familiar with the name of the case—but the difference in that case is that the son specifically told the mother that she had no authority to go into his room. This is the situation where the mother has testified that the son did not tell her not to go in that garage.

THE COURT: What about the officer saying when you look at these things—this lady testified under oath she never went near the garage. She went upstairs with the dog.

You want to call the officer out here for rebuttal for that?

MR. SIMKIN: Your Honor, the reason I say that is because the officer testified she led him in the garage.

THE COURT: I know, and she said she gave the key to little Michael.

Isn't that what the testimony is under oath?

So then we go to the credibility of the police officer.

I don't know. Just because the mother thinks she has a right to let them go in, and because the police think they have a right to go in, that doesn't mean they have a right to go in. That's why I'm giving you the case I'm talking about where part of the lady's home is locked off. She thought she had a right to go in, and the police thought they had a right to go in, but just because they think that doesn't make it right. These two brothers hold keys against the world. Of course they don't live there; two numbers difference, next door. Maybe it's one or two houses, and they keep their cars in there and they pay their mother. That's unimpeached, so you can take 30 days to see what your people want to do downstairs.

MR. SIMKIN: Judge, just for the record, Motion to Suppress Evidence is sustained?

THE COURT: Sustained.

MR. SIMKIN: Judge, can you give us a date within 30 days from today's date so that we can determine whether or not we're going to appeal the Motion to Suppress or not appeal?

It's my understanding this is the type of case where I don't think we'll be able to proceed without the physical evidence.

THE COURT: Well, I don't know about that, but the Motion to Suppress is sustained.

MR. SIMKIN: Counsel, how about June 19th?

MR. CIARDELLI: That's a bad day.

MR. SIMKIN: How about the 18th?

MR. CIARDELLI: Yes.

MR. SIMKIN: Can we make it June 18th?

MR. CIARDELLI: Yes.

MR. SIMKIN: We'd appreciate a transcript.

(An adjournment was taken to Monday, the 18th day of June, A.D. 1979.)

APPENDIX C

Order of the Supreme Court of Illinois Denying Leave to Appeal

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 8, 1981

Ms. Marcia Orr
Asst. State's Attorney
Criminal Appeals Division
Richard J. Daley Center, Rm. 500
Chicago, Ill. 60602

No. 54795—People State of Illinois, petitioner, vs. Robert Bochniak, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

Opposition

81-291

Office - Supreme Court, U
FILED
JAN 18 1982
ALEXANDER L. STEVA
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

ROBERT BOCHNIAK,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

WHETHER THE ILLINOIS APPELLATE COURT CORRECTLY APPLIED THE WELL-SETTLED LAW IN FINDING THAT A LANDLORD/MOTHER DOES NOT HAVE THE AUTHORITY TO CONSENT TO A POLICE SEARCH OF A GARAGE WHICH IS LEASED FROM HER BY HER SONS.

In deciding this case, the Illinois Appellate Court unanimously stated as follows:

> The State argues that since defendant's mother owned the premises on which the garage was located, retained a key to the garage and had never explicitly been ordered to stay out of the garage, she had the actual authority to consent to the search. Defendant, on the other hand, maintains that since he and his brother rented the garage from their mother for $20.00 per month and since his

mother never used the garage because she had no reason to do so, she did not have the authority to consent to the search.

The fact that defendant's mother owned the garage does not mean that she had the actual authority to consent to a search of the garage. In *United States v. Matlock*, Justice White of the United States Supreme Court stated that "common authority is* * *not to be implied from the mere property interest a third party has in the property." (415 U.S. 164, 171 n.7, 39 L.Ed.2d 242, 250 n.7, 94 S.Ct. 988, 993 n. 7; *People v. Ford* (1980), 83 Ill. App. 3d 57, 62-63, 403 N.E. 2d 512; *People v. Schlemm* (1980) 82 Ill. App. 3d 639, 644, 402 N.E.2d 810). Nor does the fact that defendant's mother was in possession of a key to the garage necessarily vest her with such authority. See *People v. Weinstein* (1968), 105 Ill. App. 2d 1, 245 N.E.2d 788.

Rather, the authority which justifies third-party consent rests on the mutual use of the property by persons generally having joint access or control for most purposes. (*United States v. Matlock* (1974), 415 U.S. 164, 171 n. 7, 39 L.Ed. 2d 242, 250 n. 7, 94 S.Ct. 988, 993 n. 7)

People v. Stacey (1974), 58 Ill. 2d 83, 317 N.E. 2d 24. Mrs. Olijnek testified that she never went inside the garage and that she had no reason to do so. Thus, the garage was used exclusively by defendant and his brother Michael. We conclude that although defendant's mother owned and retained a key to the garage, she did not have common authority over the premises. Her consent to the search of the garage was therefore invalid. (93 Ill. App. 3d 575, at 576; (1981).

The Illinois Court correctly determined that the definitive case in this area is *United States* v. *Matlock*, 415 U. S. 164, 39 L. Ed. 2d 242 (1974). The *Matlock* case dealt with a man who was suspected of bank robbery. The police arrested him in front of the house in which he lived, and asked a woman standing in the doorway for permission to search that house. This woman was the daughter of the couple who leased the house from its owner. She was also found to have been living

with the defendant; sleeping with him and sharing a dresser with him in one of the bedrooms of that house. The woman consented to the police search, in particular, to the search of the bedroom she shared with the defendant. The police found stolen money in the dresser in that bedroom. At the hearing to suppress this evidence, the defendant testified that he paid rent to the woman's parents for the use of the room, and argued therefore, that he alone should have the power to consent to such a police search.

In holding the woman's consent valid, the Supreme Court said: ". . . the consent of one who possess common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared . . ." (415 U. S. at 170). Further, refining this holding the court explains just what is meant by the term "common authority".

It states:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." (415 U.S. at 172).

The key to the validity of a third party consent is, therefore, the right of that person to mutual use and joint access or control. Only persons with these rights over the premises can consent to a police search of that property. This Court refines this concept and provides definitive insight as it speaks in terms of "cohabitants". It makes clear therefore, the type of sharing relationship of the property searched, that is necessary to justify this type of consent. In the *Matlock* case, the woman's consent was valid only because she lived in that bedroom with the defendant and shared the mutual use of the dresser.

The more recent Federal case of *United States* v. *Carl Will Sumlin*, 567 F. 2d 684, (1977) applies and reemphasises the *Matlock* standard. In the *Sumlin* case the defendant was under investigation for armed robbery. After the defendant was arrested the police obtained permission to search his apartment from a woman who shared the apartment with him. Incriminating evidence was seized. Addressing the defendant's contention that the evidence should be suppressed as it was obtained without his consent, the Court states:

> "The holding of Matlock focused on whether or not the permission to search was obtained from a third party who possessed common authority over or other sufficient relationships to the premises or effects sought to be inspected." (415 U.S. at 171, 94 S. Ct. at 993) The rationale behind this rule is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search. Id. at 171 n.7, 94 S. Ct. 988. See *United States* v. *Solimine*, 536 F. 2d 703, 707-8 (6th Cir.) vacated on other grounds 429 U.S. 990, 97 S. Ct. 517, 50 L. Ed 2d 603 (1976), reaffirmed as modified 551 F. 2d 124 (6th Cir. 1977); *United States* v. *Canada*, 527 F. 2d at 1379; *Kirvelaitis* v. *Gray*, 513 F. 2d at 215. (at p. 688)

Here, as in *Matlock* the Court based the validity of the third party consent on the fact that the third party shared occupancy of the premises with the defendant.

The case of *United States* v. *Kelly and Powell*, (551 F. 2d 760, 1977), further states this necessity. There, incriminating evidence was found in a common stairway in the apartment building where defendant's own apartment was located. The Court found that the consent of the apartment manager to the warrantless search of the common areas of the building was sufficient to allow the police to enter and search those areas. Again, the Court notes the *Matlock* standard in holding that because the evidence was found in an area where the manager had the right to mutual use with all apartment tenants, including the defendant, he had the authority to consent to a police search of that area.

The two-pronged test of mutual use and joint access or control has become the determinative standard in the area of third party consents. It has been adopted by the Illinois Supreme Court in *People* v. *Stacey*, 58 Ill. 2d 83, 317 N. E. 2d 24 (1974). The facts in *Stacey* are similar to those in *Matlock*. In the Illinois case, the defendant was arrested and charged with murder. While he was in custody, the police went to his home to obtain the shirt he was wearing at the time the murder occurred. The police asked Stacey's wife for the shirt. She went into their bedroom, took the shirt from a dresser in that room and gave it to the police. The defendant contended this amounted to a search by the police, and an invalid consent thereto by his wife. In upholding the wife's consent, the Court uses the language of *Matlock* as it states: "... the evidence establishes a mutual use and control of the room and its equipment and the wife's right of access to the bottom dresser drawer." (58 Ill. 2d at 89). Here again the Court justifies the third party's consent because of that person's actual use and occupancy of the premises with the defendant.

In its brief, the State cites several cases purportedly showing that parental ownership of the premises to be searched along with retention of a key to those premises by the parent, confers upon that parent sufficient authority to meet the *Matlock* standard. Upon careful examination of those cases, however, it is seen that there is no such power given a parent on the mere existence of a familial relationship with the defendant.

Before analyzing those cases, however, the defendant here points out this Court's opinion in *People* v. *Weinstein*, 105 Ill. App. 2d 1, 245 N. E. 2d 788 (1968). In that case, Irwinna Weinstein was charged with the murder of her husband. While she was in custody, the police went to her home, which had been owned in joint tenancy with her husband. The police sought to search the premises and consent was given to them by the Defendant's father-in-law, Meyer Weinstein. Certain evidence was obtained by the police as a result of this search.

Testimony at trial showed that the father-in-law had always had a key to his son's and daughter's-in-law home.

As in the present case, the State tried to show that the search made by the police was lawful because Meyer Weinstein, by virtue of his familial relationship and possession of the house key, had the authority to consent to the search. This Court struck down that contention, stating:

> "It is clear in the instant case that Meyer Weinstein did not have equal rights to the use or occupation of the premises. He did not reside there, and possession of the house key gave him no right of occupancy." (105 Ill. App.2d at 6).

Here this Court disregards any familial ties that may happen to exist and focuses rather on the same standard of use and occupancy later adopted by the Supreme Court. A study of the cases cited by the State reinforces this position, showing that the presence of a parental relationship is important only as it affects the existence or non-existence of that parent's right to mutual use and joint access or control of the premises to be searched.

The State cites *People* v. *Johnson*, 23 Ill. App. 3d 886, 321 N. E. 2d 38 (1974). While the defendant Johnson was in police custody, two officers went to the home of his parents, with whom the defendant resided, and with their consent, searched the house including Johnson's bedroom. There the police found evidence of the crime of which Johnson was charged. The defendant argued that this evidence should be excluded from trial as it was obtained without a search warrant, pursuant only to what he claimed was the invalid consent of his parents.

The Court applied the *Matlock* test and upheld the consent. The validity of the consent was not based on any special authority held by reason of the father and mother's parental stature but rather by reason of their actual rights to mutual use and joint access or control over their entire home. The Court makes clear that the defendant's room was freely accessible to

the mother at all times. She, in fact, entered the room at least once a week to clean the room and change the linen. It is seen that there the mother had parted with none of her rights to the use, access or control of the searched premises.

The case of *United States* v. *Wright*, 564 F. 2d 785 (8th Cir. 1977) further highlights the standard to be applied in situations of this nature, and the facts which are determinative. In that case, FBI agents searched the home where one of the defendants, his wife and child resided. Crucial to the Court's holding in this case is the fact that the home was owned and also occupied by that defendant's mother. In fact, the mother informed the FBI agents that all residents there had equal access to, and use of all rooms of the house and all articles of furniture therein. Using these facts, and not the existence of a parental relationship, the Court applies the *Matlock* test and upholds the mother's third party consent.

It is because of this right of the parents to the mutual use and joint access or control of the home they own and occupy that the Arkansas Supreme Court, in the case sited by the State writes:

> "A child either dependent or emancipated (having reached his majority) does not have the same constitutional right or expectation or privacy in the family home that he might have in a rented hotel room . . . (*Grant* v. *State of Arkansas*, 589 S. W. 2d 11, 14 (1979)."

The Arkansas Court acknowledges that parents have definite rights concerning the home they use and occupy. It is their home and the family home, not the individual child's sole possession. The Court explicitly states that a different situation would arise if the child had his own rented premises separate from the family home. If that were the case, the fact that the child has rented the premises shows that he holds the rights of use and access exclusive from all others.

All these cases show that the determinative factor is whether or not the consenting party has the right to mutual use and joint access and control of the property searched.

This analysis carries over to another aspect of the third party consent area to which the *Matlock* standard applies: the consent given police by a landlord to search premises of his tenant. In these types of cases, the consenting third party merely owns and/or retains a key to the premises the police want to search. As will be seen from the following cases, this illusory authority or property interest falls far below the level required by the standard of "mutual use and joint access or control."

The landmark case in this area is *Chapman* v. *United States*, 365 U. S. 610, 5 L. Ed. 2d 828 (1961). In that case, one Bridgaman rented a small building on the back of his land to the defendant Chapman. One Sunday morning, Bridgaman went to Chapman's building in order to summon him for church services. Apparently, Chapman had found an alternative way to lift his spirits, for although the tenant was not home, Bridgaman detected a strong odor of whiskey mash. The landlord immediately summoned the police. With the landlord's consent, the police entered the premises and found illegal distillery equipment. This evidence was seized and when Chapman returned home, he was arrested. Chapman's motion to suppress this evidence was denied. On Appeal, the Supreme Court of the United States Considered the validity of the landlord's consent to search the tenant's premises. The Court states: ". . . to uphold such an entry, search and seizure without a warrant would reduce the (Fourth) Amendment to a nullity and leave (tenants) homes secure only in the discretion of landlords)." (365 U. S. at 615, quoting *Johnson* v. *U. S.*, 333 U. S. 10 at 14).

The constitutional basis for holding the landlord's consent invalid can be buttressed by the practical test of *Matlock*. The whole basis of any rental agreement is that for the period of

that tenancy, the lessee has exclusive rights to the use, access and control of the rented property. Although the landlord retains an ownership right in the property, he has given up all right to possession and in no way achieves the "common authority" mandated by *Matlock*.

The later case of *Stoner* v. *California*, 376 U. S. 483, 11 L. Ed. 2d 856 (1964) reinforces this position. There, a hotel clerk gave the police permission to search the defendant's hotel room in his absence. Using a key provided by the clerk, the police entered the room and seized items later used as evidence. Holding the consent given by the hotel clerk to be invalid, the Court states: "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's or the hotel's." (376 U. S. at 483).

Later the Court concludes:

> "No less than the tenant of a house, or the occupant of a room in a boarding house, *McDonald v. United States*, 335 U.S. 451, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." (376 U. S. at 498).

Applying this law to the facts of the case at bar, it is seen that the defendant's mother neither used nor had any substantial right to the access or control of the premises she allowed the police to search.

The building searched in this case is a garage owned by the defendant's mother and rented from her by the defendant. Obviously, the mother did not live in this building and the fact is she had never used the premises at all during the five or six years in which the defendant was a tenant. This clearly distinguishes this case from those cited by the State where the parent's consent was upheld because the premises to be searched were within the home he used and occupied.

The existence of a familial relationship between the landlord and tenant in this case, given such importance by the State, is now seen to be of very little, if any, significance. The defendant is not a child, but an adult, over thirty years of age, living in his own house next door to his mother.

Examination shows that this is nothing more than a typical landlord-tenant relationship. From the law stated above, it is clear that a landlord, whether he retains a key or not, has no authority to consent to a police search of his tenant's premises.

In the present case, the police searched the garage rented by the defendant solely on the basis of the consent of the landlord. They did not seek nor did they obtain the consent of the defendant or his brother, a co-tenant. The police did not possess nor sought at any time, to obtain a search warrant for the defendant's premises.

The consent of the defendant's mother was invalid. The search by the police of the garage rented by the defendant was therefore, illegal, and any evidence seized as a result of that search should be, and was properly excluded from use at trial.

In its petition, the State also contends that the Fourth Amendment only protects one's reasonable expectation of privacy and that in this case the brother who rented the garage could not possibly have any such reasonable expectation.

The cases previously cited, however, and the testimony taken at the preliminary hearing in this matter, clearly show that the defendant had every right to be secure in his rented property both from the landlord and the entire world. Your respondent herein asks the Court to be guided by the clearly established legal precedent which touches every aspect of this case and the relationship of the parties.

The Court should not be moved by strained assumptions that the only reason the mother never entered the garage is that she didn't want to. This and other assumptions in the State's

petition are without any basis in the evidence and testimony presented in this case.

The State likens the position of the respondent to that of a burglar within a house. This totally ignores the uncontroverted testimony of his valid property interest in the garage and his tenant/landlord relationship with his mother.

It is clear that the Illinois Appellate Court decided correctly when it determined the mother had no actual authority to consent to a police search of the garage rented by the respondent.

The State lastly contends that the police could rely on the apparent authority of the mother to consent to their search of the respondent's premises.

The Illinois Appellate Court found as follows:

> The State alternatively argues that the search of the garage was valid because defendant's mother had the apparent authority to consent to the search. In support of this argument, the State points to several facts in the record, namely: that defendant's mother answered the door at the address where the police thought defendant resided; that she identified herself as defendant's mother; that she said he owned the premises; that she invited the police to search; that she opened the garage with a key; and that she failed to tell the police that defendant rented the garage from her.
>
> In 1964 in *Stoner v. California* (1964), 376 U. S. 483, 11 L. Ed 2d 856, 84 S. Ct. 889, the United States Supreme Court considered an argument similar to the one at hand, and held that "our decision makes clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'." (376 U. S. 483, 488, 11 L. Ed. 2d 856, 860, 84 S. Ct. 889, 892). Four years later, in *People v. Miller* (1968), 40 Ill. 2d 154, 238 N. E. 2d 407, the Illinois Supreme Court was presented with a factual situation under which it easily could have upheld a search conducted pursuant to the consent of one

> who had apparent authority over the subject property. The supreme court, however, relying on *Stoner* rejected the prosecution's apparent authority argument. Subsequent Illinois cases also have refused to apply the apparent authority doctrine in consent search case. (See *People v. Schiemm* (1980), 82 Ill. App. 3d 639, 402 N. E. 2d 810; *People v. Johnson* (1975), 28 Ill. App. 3d 799, 329 N. E. 2d 464. (93 Ill. App. 3d at 577).

The *Miller* case, cited by the Illinois Appellate Court (above) is similar to the facts presently before the Court. There the police asked permission of the owner of the house to search the garage, and the car inside the garage. The car belonged to the defendant, and in suppressing the evidence seized therein the Court stated:

> "Regardless of the officer's good faith in making the search and his reliance upon the consent given by the owner of the house, the fact remains that it was *Miller's* constitutional right which was at stake. The officer had no warrant for the search and it is not claimed that the search was incident to the arrest. The only justification asserted for the search is the consent of the owner of the house and, as pointed out above, this consent did not waive *Miller's* constitutional protection against a search of his property." (40 Ill. 2d at 157-8)

Responding to the Petitioner's contention that the police acted in good faith and therefore, should not be penalized by the exclusionary rule, it need only be noted that the police acted without a search warrant although there existed no exigent circumstances which would lead them to believe the evidence may have been hidden or removed. Further, the police went to the Respondent's mother's house when they knew that the Respondent was away at work. As easily as their actions may be viewed as "good faith", they may be viewed as a calculated maneuver to circumvent the necessity of getting a warrant or the respondent's own consent to search his premises.

CONCLUSION

For all these reasons, the Respondent Robert Bochniak, asks this court to deny this petition for a Writ of Certiorari.

Respectfully submitted.

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